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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRELL LEWIS MARKHAM,

Defendant and Appellant.

D060113

(Super. Ct. No. FSB704700)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Michael A. Smith, Judge. Affirmed in part, reversed in part and remanded for further
limited proceedings.

I.

INTRODUCTION

Defendant Terrell Lewis Markham appeals from a judgment of conviction after jury trial. Markham first contends that the trial court abused its discretion in failing to sever the substantive gang offense alleged against him and/or failing to bifurcate the gang

enhancement allegations from their corresponding substantive offenses for trial. Second, Markham challenges the sufficiency of the evidence to support his convictions for brandishing a firearm in the presence of an officer and resisting an executive officer, as well as the jury's true findings on the gang enhancements associated with these convictions. Finally, Markham contends that the trial court applied an incorrect standard of review in considering his motion for a new trial under Penal Code¹ section 1181, and that remand for the trial court to reconsider the motion is appropriate.

We reject Markham's first two contentions. However, we agree with Markham that the trial court did not apply the correct standard of review when considering his motion for a new trial. The People concede (and we agree) that if this court concludes that the trial court did not appropriately review the evidence to determine independently whether the evidence was sufficient to establish the elements of the offenses beyond a reasonable doubt, then the appropriate remedy is to remand the case for the limited purpose of allowing the trial court to reconsider Markham's motion for a new trial. We therefore vacate both the court's order denying Markham's motion for a new trial and the judgment, and remand the case to the trial court for the limited purpose of rehearing and determining Markham's motion for a new trial.

¹ Further statutory references are to the Penal Code unless otherwise specified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution's case*

Sergeant James Beach and Officer Adam Affrunti of the San Bernardino Police Department's gang unit were patrolling in a marked police vehicle on November 17, 2007, in the territory of a gang known as The Projects. The officers were both wearing shirts with the words "SMASH" and "San Bernardino Police" on them.²

As the officers were driving, they saw two men standing outside of West Side Food and Liquor. Officer Affrunti recognized Markham from prior contacts with him and believed that Markham was a member of The Projects gang. Markham was wearing white tennis shoes with red on them, pants with red stripes, a black and red baseball cap, and, despite the warm weather, a large winter coat. The coat struck the officers as strange and seemed out of place. The officers pulled over and started to get out of their car, intending to approach Markham and the other man to talk with them, but the two men started walking in a different direction.

The officers got out of their patrol car and told Markham and the other man to stop. The other man stopped immediately, turned toward the officers, and showed them his hands. Markham "backpedal[ed]" and then turned and took off running. The officers jumped into the patrol car and tried to catch up with Markham. As they watched

² "SMASH" stands for "San Bernardino Movement Against Street Hoodlums."

Markham running, it appeared that the right side of his jacket was swinging differently from the left side. This led the officers to believe that he had something heavy in the right side pocket. The officers also saw Markham put his right hand in the right pocket a few times while he was running. Sergeant Beach thought that Markham had a weapon, based on the movement of his jacket and the fact that Markham had taken off running upon seeing the officers.

When Markham started to jump over a fence, Sergeant Beach pulled over to let Officer Affrunti jump out of the car and pursue Markham on foot. As Affrunti was chasing Markham on foot, he noticed that Markham was holding his right hand on his waistband area, while his left arm was swinging as he ran. Affrunti believed that Markham was armed with a weapon.

Officer Affrunti continued to chase Markham through an apartment complex, through two open gates, and over a wall. Affrunti was continuously yelling for Markham to stop. Once Affrunti cleared the wall, he lost sight of Markham. Affrunti pulled his weapon out of its holster and began looking for Markham. Affrunti entered the courtyard of an apartment complex, but did not see anyone at first. He then noticed someone behind a bush. Affrunti kept his weapon in a "low-ready" position as he gradually stepped around the bush.

When Affrunti stepped around the bush, he had a full view of Markham. Affrunti could see that Markham was crouched down with his hands behind his back. Because of the size of Markham's jacket, Affrunti had difficulty seeing Markham's hands, so Affrunti yelled, "Show me your hands." Markham did not comply. Affrunti was afraid that

Markham had a weapon and that this was the reason he was not showing Affrunti his hands. Affrunti continued to order Markham to show his hands, but Markham refused. Affrunti moved his firearm into the "high ready" position, so that he would be ready to fire. Markham eventually moved his left hand out so that it was in front of him. Affrunti told Markham to show his right hand because Affrunti could not see Markham's right hand at all.

After some delay, Markham brought his right hand out and showed it. Officer Affrunti ordered Markham to get down on the ground. At first, Markham did not comply. However, Markham then began to make movements as if he were getting down on the ground. Markham continued to look around, however, and Affrunti believed that Markham might still run. When Markham was in a crouched position, which Affrunti described as a "3-point football stance," he stopped. Markham had his left foot and left hand and his right knee or foot on the ground. Affrunti thought that Markham was getting ready to charge him.

Officer Affrunti was moving around Markham constantly, so as to not be an easy target. In order to knock Markham off balance, Affrunti kicked Markham in the right shoulder. Affrunti may have kicked Markham a second time, hitting him in the head or neck. According to Affrunti, he did not mean to kick Markham in the head or neck; his intention was to kick Markham somewhere closer to the center of his body in order to knock Markham off balance. Markham fell to his hands and knees as a result of Affrunti's kicks.

Officer Affrunti backed up a bit and continued to order Markham to get down on the ground. Markham refused to comply. Affrunti heard a woman screaming over his left shoulder and turned to look at her. Affrunti could not understand what the woman was saying. He told her to get back in her house.

When Affrunti turned back toward Markham, Markham had shifted his position so that his back was no longer parallel to the ground, and he was reaching into his right pants pocket with his right hand. It appeared to Affrunti that Markham was drawing a gun. Markham pulled a gun a few inches out of his pocket. When Affrunti saw Markham's gun, he fired five rounds toward Markham. Affrunti stopped shooting when he saw Markham fall to the ground.

Markham was hit three times. One shot hit his head, one shot hit his chest, and a third shot hit his left hand. Officer Affrunti immediately radioed to the police dispatcher that shots had been fired, and requested medical assistance. After he called for assistance, Affrunti knelt down next to Markham and removed a gun from Markham's back pocket. There was a live round in the chamber, and the gun was ready to be fired.

At some point during the incident, Sergeant Beach had asked Officer Affrunti over the radio if he was "Code 4," which meant that he was fine and did not need assistance. Affrunti had responded "Negative" to Beach's question, indicating that he did need assistance. When Affrunti later radioed that shots had been fired, he told the dispatcher that Markham had tried to pull a gun on him. Beach thought that Affrunti sounded scared during those radio transmissions, and said that he had never heard Affrunti sound that way before.

Dr. Chanikarn Changsri, a medical examiner, testified as an expert in bullet trajectories. After describing the bullet wounds that Markham suffered, Dr. Changsri testified that Markham's gunshot wounds could not have been inflicted if Markham had been lying flat on his stomach with his hands out to his sides, as Markham claimed. Dr. Changsri also testified that a demonstration by the prosecutor showing the position that Markham would have been in (according to Officer Affrunti's testimony) was consistent with the wounds. However, Dr. Changsri could not determine whether the wound on the right side of Markham's head was an entrance or exit wound, because she had only seen photographs of the scar. However, because, in general, the trajectories of the other bullets that had hit Markham were from right to left, it was most likely that the bullet that struck Markham's head had entered from the right side of his head and exited just above his left eyebrow. Based on this, it was unlikely that Markham had been looking at Officer Affrunti when he was shot in the head. Instead, Markham would have been facing away from the shooter, exposing the right side of his head. Similarly, Markham could not have been looking at his rear pocket at the time this shot hit him. However, people tend to move when shots are fired at them.

San Bernardino Sheriff's Deputy Chief Robert Fonzi testified as an expert on the reasonable use of force by police officers. Fonzi testified that law enforcement officers sometimes must use force to effectuate an arrest, overcome resistance, or prevent a suspect from escaping. The degree of force that is reasonable increases when subjects fail to comply with officer commands, resist arrest, or flee. Given a hypothetical that

tracked the facts of this case, Fonzi testified that the officer's actions were reasonable under the circumstances.

San Bernardino Police Department Sergeant Travis Walker testified as a gang expert, and specifically, as an expert on The Projects gang. The Projects street gang was originally known as the Imperial Empire Mob. In 2007, there were 154 documented members of The Projects gang. The gang's primary activities are narcotics sales, murders, carjackings, attempted murders, assaults with firearms, assaults on officers, burglaries and robberies.

In Sergeant Walker's experience with members of The Projects, no member had ever walked away from the gang. The only way out of the gang was to die.

Members of The Projects have a reputation for committing violent assaults on police officers, and this type of assault is among the primary activities of The Projects gang. Sergeant Walker was aware of two instances that involved members of The Projects shooting at police officers. In addition, the "shot-caller" of the gang had a large graphic tattoo on his back that depicted the murder of a police officer by three gang members.³

The gang expert also testified about how gang members have to put in "work" for the gang to earn respect, and that this typically means that they commit crimes on behalf of the gang. Violent crimes earn more respect. The expert further testified that gangs often have younger members carry firearms because gang members assume that juveniles

³ The tattoo contained the words "SBPD 187" and "Retaliation."

are less likely to be searched by officers and that they will receive less harsh punishment than adult gang members. When gang members possess stolen firearms, it benefits the gang because it is impossible to trace those firearms back to the gang members. Running away from a police officer benefits a gang because it serves as a diversionary tactic, distracting officers from other criminal activity in the area. In addition, gang members gain status by successfully eluding police. This also brings more notoriety to the gang itself.

Markham had two gang related tattoos. One said "T-Money," which was his gang moniker, and another said "M-O-B," which stood for the Imperial Empire Mob, one of the other names for The Projects gang. An individual would suffer serious consequences if he were to get a gang related tattoo but was not a member of the gang.

Markham had been contacted by police while in the company of other documented members of The Projects on several occasions between 2002 and 2007. All of these contacts occurred in The Projects territory. On August 8, 2010, Markham was again contacted with documented members in The Projects territory.

Julie Schlobolm became Markham's probation officer in July 2007. In August 2007, Markham and his mother met with Schlobolm. During that meeting, Markham's mother indicated that she was concerned that Markham was involved with The Projects gang. Markham denied being involved with the gang at that time, but admitted that he used to hang out with them. Schlobolm imposed gang terms on Markham, including that he not be present at gang gathering spots, not wear clothing associated with the gang, and not be in The Projects' territory.

On the day of the current incident, Markham was wearing the "uniform" for The Projects members, which included the color red on his shoes, pants and hat. People who drove through The Projects territory and saw Markham in that clothing would have associated him with The Projects street gang. If Markham had not been a gang member, he would not have been permitted to wear such clothing in The Projects territory without suffering some sort of consequence.

Sergeant Walker also reviewed jail telephone calls between Markham and members of The Projects gang. In these recordings, others gang members referred to Markham as "T-Money."

Based on this evidence, it was Sergeant Walker's opinion that Markham was a member of The Projects criminal street gang at the time of this incident.

On rebuttal, the prosecution offered evidence of three prior incidents of criminal activity to show Markham's propensity for violence. These included an incident at a middle school during which Markham got into a fight with another student. When the other student gave up, Markham "sucker punched" the boy. Markham had to be physically restrained to break up the fight, and Markham hit and cussed at the person who restrained him.

In another incident, a police officer made contact with Markham and another student at a local high school. The other student claimed to be a member of The Projects gang. Markham had a knife in his pocket at the time. With respect to the third incident, Javier Palacios testified that in November 2005, while he was walking home from high school, two young men attacked him. When Palacios broke free and tried to run, a third

young man rode up on a bicycle and shot Palacios three times with a BB or pellet gun. At trial, Palacios identified Markham as the person who had shot him, although he said that he was "not too sure."

2. *The defense case*

The defense called a number of witnesses who lived in the apartment complex and witnessed the encounter between Markham and Officer Affrunti. Arturo Medrano testified that he heard some commotion and looked through his back door to see what was going on. Medrano saw Affrunti with his gun drawn. Markham was lying on the ground. Medrano said that Markham was "not completely on his stomach" but was "somewhat on his side." Medrano heard Affrunti yell at Markham to show Affrunti his hands, but he did not hear a Hispanic woman yelling. Medrano said that he did not see Affrunti look away from Markham, nor did he see Markham reach toward his back pocket. Markham was on his side when Affrunti fired the shots.

Alisi Auau was sitting in a chair in the courtyard on the day of the incident. Her son alerted her to a commotion, and when she looked over, she saw Markham lying on the ground. He was on his stomach with his hands on the ground near his shoulders. Auau saw Officer Affrunti with his gun drawn. She saw Affrunti kick Markham in the face and heard Affrunti tell Markham to put his hands behind his back. After Affrunti kicked Markham, he backed up and started shooting at Markham. Auau did not hear a Hispanic woman, did not see Affrunti look away from Markham, and did not see Markham reach for his back pocket.

Auau's son, Atusapai Taimalie, testified that he saw Markham and Affrunti running through the courtyard. According to Taimalie, Affrunti followed Markham around a bush and then pushed him down to the ground. After Affrunti pushed Markham down, he kicked Markham twice. Affrunti then backed up and shot Markham. Taimalie thought that one of Affrunti's kicks had knocked Markham unconscious. Taimalie further testified that Markham's hands were in front of him when Affrunti shot him. Taimalie never saw Markham reach for his back pocket. Taimalie believed that Markham was lying flat, with his face on the ground, at the time he was shot.

The defense also called retired Los Angeles Police Department Detective Steven Strong as a gang expert. Strong testified that gang members typically do not seek to assault or harm police officers because that would bring too much negative attention from law enforcement. Strong had examined the evidence and was of the opinion that Markham did not commit these crimes for the benefit of the gang, and that Markham was not an active participant in a criminal street gang at the time of the incident. Strong conceded, however, that a gang member's possessing a gun would elevate that gang member's status.

The defense also offered evidence of prior incidents in which Officer Affrunti had shot at other suspects. In July 2006, Affrunti shot at a man who tried to pull a gun on Affrunti. Affrunti fired 12 shots at the man. When the man continued running, Affrunti fired more shots. At some point the man stopped and threw his gun under a truck, and Affrunti stopped firing. The man survived his injuries. In April 2007, Affrunti was assisting another officer with a traffic stop in gang territory. The vehicle that had been

stopped took off, and officers pursued it. When the vehicle drove down a small embankment and came to a stop, several officers, including Affrunti, got out of their vehicles. Affrunti drew his weapon and approached the passenger side of the vehicle. The man in the passenger seat got out with his hands in his waistband. The man turned away from Affrunti, and someone from inside the vehicle yelled, "Shoot him. Shoot him." As the man turned back toward Affrunti, Affrunti fired 13 shots. Affrunti's partner also fired at the man. That man died as a result of his gunshot wounds.

B. *Procedural background*

On November 1, 2010, a jury convicted Markham of one count of brandishing a firearm in the presence of an officer (§ 417, subd. (c); count 1), one count of resisting an executive officer (§ 69; count 2), and one count of receiving stolen property (§ 496; count 3).⁴ The trial court dismissed count 4, which charged active participation in a criminal street gang (§ 186.22, subd. (a)), after the People presented their case.

The jury also found true the enhancement allegations that Markham had committed the offenses charged in counts 1 through 3 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). In addition, the jury found true the enhancement allegation that Markham personally used a firearm in the commission of count 2.

⁴ This was Markham's second jury trial. The first trial ended in a mistrial after the jury declared that it was hopelessly deadlocked.

The trial court designated count 2 as the principal term, and sentenced Markham to the middle term of two years on count 2, with an additional three years for the firearm enhancement. The court sentenced Markham to eight months (one-third the middle term) on count 3, to run consecutively to the sentence on count 2. As to count 1, the court sentenced Markham to two years (the middle term), but stayed punishment on this count pursuant to section 654. The court struck the punishment for the gang enhancements on counts 2 and 3.⁵ The total term imposed was five years eight months.

Markham filed a timely notice of appeal.

III.

DISCUSSION

A. *The trial court did not abuse its discretion in denying Markham's motion to sever and/or bifurcate trial of the gang-related offense and enhancement allegations*

Markham contends that the trial court abused its discretion in denying his motion to sever count four, the street gang offense, and the gang enhancement allegations attached to the three other substantive offenses for trial.⁶

⁵ Although the trial court did not expressly state that it was striking the punishment for the gang enhancement on count 1, it appears that the trial court intended to do so, since it did not impose a sentence for that enhancement.

⁶ Markham's motion was a motion to sever both the substantive gang offense and the gang enhancements. However, the gang enhancements would technically have been subject to a motion to bifurcate, not to sever. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*) [discussing request to bifurcate gang enhancement allegations from trial on substantive offenses].) We will refer to Markham's motion as a motion to sever, but in our discussion we also address whether the trial court abused its discretion in failing to bifurcate the gang enhancements from the substantive offenses.

At a hearing on Markham's motion in the trial court, Markham conceded that some of the gang evidence would be admissible in a trial on counts 1 through 3. In particular, Markham acknowledged that evidence of his association with The Projects street gang could be admissible because of its relevance to Officer Affrunti's initial decision to stop Markham, and also to Officer Affrunti's mental state and his later actions. The prosecutor argued that the gang evidence was relevant to Markham's motive and intent, and also went to the credibility of some witnesses.

The trial court denied Markham's severance motion, reasoning that much of the gang evidence would be admissible as to counts 1 through 3, even if the court were to sever the substantive gang offense and/or the gang enhancement allegations.

In this case, "to entirely eliminate the gang evidence would have required a severance . . . of the street terrorism count and the bifurcation of the gang enhancements." (*People v. Burnell* (2005) 132 Cal.App.4th 938, 947 (*Burnell*).) We therefore consider whether the trial court abused its discretion in refusing to sever the substantive gang offense and/or refusing to bifurcate trial on the gang enhancements.

1. *The trial court did not abuse its discretion in denying Markham's motion to sever the gang enhancements*

A trial court has broad discretion to control the conduct of a criminal trial. (*Hernandez, supra*, 33 Cal.4th at p. 1048.) The court's power to bifurcate the trial of a gang enhancement from the trial of the substantive offense is implied in section 1044. (*Hernandez, supra*, at p. 1048.)

"In cases *not* involving [a] gang enhancement, [the Supreme Court has] held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at p. 1049.) In contrast, however, in cases that do involve a gang enhancement, expert opinion testimony about gang culture and habits is admissible to prove the enhancement. (*Ibid.*)

"[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.)

In moving for bifurcation, the defense must " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]" (*Hernandez, supra*, 33 Cal.4th at p. 1051.) Bifurcation may be necessary where the predicate offenses offered to establish the pattern of criminal activity are "unduly prejudicial," or where some of the other gang evidence may be "so extraordinarily prejudicial, and of so little relevance to guilt" that it may influence the jury to convict regardless of the defendant's guilt. (*Id.* at p. 1049.)

On appeal, we review the trial court's denial of a motion to bifurcate for abuse of discretion. (*Hernandez, supra*, 33 Cal.4th at p. 1048.) When the evidence sought to be

severed is related to a charged offense, the burden is on the defendant to clearly establish a substantial danger of prejudice requiring bifurcation. (*Id.* at p. 1050.)

The trial court did not abuse its discretion when it denied bifurcation of the gang allegations and evidence in this case. The gang evidence was necessarily intertwined with the charged offenses as to several relevant issues, particularly motive and whether Officer Affrunti was lawfully performing his duties. "Motive is always relevant in a criminal prosecution." (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]' [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168.) Further, the gang expert's testimony was relevant to the gang enhancements because it tended to show that Markham's conduct in resisting arrest, brandishing a weapon, and possessing a stolen firearm, was conduct that benefitted his gang. The prosecution would have had to present evidence of the substantive offenses underlying the gang enhancements in order to prove that those offenses were committed for the benefit of or in association with the gang. Such cross-admissibility with respect to the gang enhancements dispels any inference of prejudice from trying the enhancements at the same time as the substantive offenses. (*People v. Marshall* (1997) 15 Cal.4th 1, 28 (*Marshall*).) In other words, where evidence concerning one offense is also relevant and admissible concerning another charged offense or enhancement, there is no reason to bifurcate. (See *ibid.*)

Accordingly, the court acted within its discretion in denying the motion to sever the gang enhancements.

2. *The trial court did not abuse its discretion in denying Markham's motion to sever trial of the substantive gang offense*

The statutory authorization for joinder of criminal charges is set forth in section 954. That section provides in relevant part:

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

Even where criminal charges are properly joined pursuant to section 954, a trial court may exercise its discretion to order separate trials in the interests of justice. "[A] determination as to whether separation [of the trial of offenses] is required in the interests of justice is assessed for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

"In the context of severing charged offenses, we have explained that 'additional factors favor joinder. Trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.] Accordingly, when the evidence sought to be severed relates to a charged offense, the 'burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.] When the offenses are joined for trial the defendant's guilt of all the offenses is at issue and the problem of confusing the jury with collateral

matters does not arise. The other-crimes evidence does not relate to [an] offense for which the defendant may have escaped punishment. That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice.' [Citation.]" (*Hernandez, supra*, 33 Cal.4th at p. 1050.)

In this case, it is clear that the offenses charged against Markham, including count 4, the substantive gang offense, arose out of the incident with Officer Affrunti. The counts were thus all connected in their commission.⁷ As a result, the offenses met the requirements of joinder under section 954.

"Whether a trial court abused its discretion in denying a motion to sever necessarily depends upon the particular circumstances of each case. [Citations.] The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the

⁷ In his reply brief, Markham suggests that the commission of the substantive gang offense was somehow not " 'connected together' " with the other three counts. However, the operative charging document alleges that Markham committed the gang offense on the same date as the other three charged offenses, and it appears clear that the underlying felony conduct alleged to support the substantive gang offense was one or more of the other charged felony offenses.

charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.] A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice. [Citations.]" (*Marshall, supra*, 15 Cal.4th at pp. 27-28.)

Joint trials of offenses that occur together are legislatively preferred over separate trials. The party requesting severance of properly joined offenses carries a very heavy burden to " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried' [citation]" before such a severance will be granted. (*Burnell, supra*, 132 Cal.App.4th at p. 946; see also § 954.) Markham failed to make this showing. Contrary to Markham's contention on appeal, it is apparent that much of the evidence that the prosecution intended to introduce to prove counts 1 through 3 would have been admissible to prove the substantive gang offense. The evidence provided by the gang expert concerning Markham's association with The Projects and his active participation in the gang supplied a motive for the other substantive offenses—to benefit his gang and improve his status and reputation in the gang. Further, the gang evidence was particularly relevant to, and probative of, the question whether Officer Affrunti was lawfully performing his duties or instead, used excessive force in detaining Markham; the circumstances that were apparent to Affrunti at the time of his encounter with Markham were relevant to the jury's determination of the lawfulness of Affrunti's actions. The other substantive offenses charged in this case, in turn, demonstrated that Markham's gang participation was more than nominal or passive, as required by *People v. Castenada* (2000) 23 Cal.4th 743, 752, and provided the evidentiary basis for the prosecution's

theory as to how Markham willfully promoted, furthered, or assisted in felonious conduct by members of his gang.

The cross-admissibility of the evidence with respect to the non-gang substantive offenses and the gang offense dispels any inference of prejudice from trying all of these offenses and gang enhancements together. Because the trial court correctly determined that the evidence would be cross-admissible, its admission was not error even though the court later determined that the evidence of the substantive gang offense was insufficient to sustain the charge and eventually dismissed that charge. In assessing whether the trial court abused its discretion in denying a motion to sever, the reviewing court examines the record at the time of the trial court's ruling. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1032.) Although evidence of gang activity may be inherently prejudicial, under the circumstances of this case, we conclude that the trial court did not abuse its discretion in determining that a single trial of all of the charges, including the gang offense charge, was appropriate.

3. *The introduction of gang evidence did not render the trial unfair*

"Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) The same due process protection applies to bifurcation. (See *Hernandez, supra*, 33 Cal.4th at p. 1049 [disapproving admission of evidence "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt"].)

In arguing that the admission of the gang evidence rendered his trial fundamentally unfair, Markham relies heavily on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), which held:

"To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*Id.* at pp. 229-230.)

In *Albarran*, the defendant was charged with multiple offenses based on his participation in a shooting at the victim's home. Although the defendant was not charged with the substantive gang offense, the People alleged gang enhancements. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 217-220.) The trial court permitted the prosecution to introduce gang evidence to prove the defendant's motive and intent. The jury convicted the defendant of the substantive offenses and found the gang enhancements to be true. However, the trial court later granted a motion to dismiss the gang allegations for insufficient evidence. (*Ibid.*)

Given these unique circumstances, the *Albarran* court held that while the trial court may have initially found that defendant's gang activities were relevant and probative of his motive and intent, the court abused its discretion when it permitted the prosecution to introduce additional gang evidence that was irrelevant to defendant's

motive or the substantive criminal charges. (*Albarran, supra*, 149 Cal.App.4th at p. 217.) The irrelevant evidence included threats made by other gang members to kill police officers, descriptions of crimes committed by other gang members, and references to the Mexican Mafia prison gang. The *Albarran* court characterized the irrelevant gang evidence as "extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Id.* at p. 230, fn. omitted.) The *Albarran* court concluded that the irrelevant and prejudicial gang evidence was so inflammatory that it "had no legitimate purpose in this trial" (*ibid.*), and ultimately determined that the admission of that evidence had violated defendant's due process rights. (*Id.* at p. 232.)

This case is not "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran, supra*, 149 Cal.App.4th at p. 232.) In contrast to *Albarran*, the gang testimony in this case was not merely tangentially relevant to the substantive offenses. In addition, the evidence was important to establish the context in which Officer Affrunti acted. Although, as in *Albarran*, there was testimony about threats to police officers made by members of The Projects, unlike in *Albarran*, that evidence, together with evidence of the gang's territory and Markham's association with the gang and gang tattoos and clothing, was relevant to an understanding of Affrunti's conduct in detaining Markham and to the question whether Affrunti was lawfully performing his duties. Thus, unlike in *Albarran*, the gang testimony in this case was not sensational and prejudicial while being only minimally relevant. Rather, it provided

important context and was necessary to the prosecution to prove the elements of the substantive offenses and the gang enhancements.

The fact that the court ultimately dismissed the substantive gang offense does not necessarily render the admission of the gang evidence grossly unfair in the context of this trial. If the substantive gang offense had been the only gang related charge, evidence introduced by the prosecution to prove that offense might have been deemed to have rendered the trial unfair, in hindsight, given the trial court's ultimate dismissal of that charge for insufficient evidence. However, Markham was also charged with gang enhancements, and much of the same evidence that was introduced to prove the substantive gang offense was also relevant and admissible to prove the truth of the gang enhancement allegations. Under these circumstances, we conclude that the joinder did not "result[] in 'gross unfairness' amounting to a denial of due process." (*People v. Arias* (1996) 13 Cal.4th 92, 127; see also *People v. Davis* (1995) 10 Cal.4th. 463, 509 (*Davis*).)

Further, the trial court instructed the jury that it was not permitted to consider the gang evidence to establish that Markham had a bad character or that he was disposed to commit crimes. We presume that the jury followed the court's instruction. We therefore conclude that the court's denial of Markham's severance (and implied bifurcation) motion did not render this trial grossly unfair.

In sum, because the evidence concerning the substantive counts, and the gang count and gang enhancements, was mutually relevant, cross-admissible, and more probative than prejudicial, Markham's severance and bifurcation arguments are without merit.

B. *There is substantial evidence to support the jury's findings*

Markham contends that the evidence is insufficient to support the jury's guilty verdicts on counts 1 and 2, as well as the gang enhancements attached to those counts. We disagree.

1. *Legal standards*

In determining the sufficiency of the evidence to support a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We ' ' 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.] [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

We review the sufficiency of the evidence to support an enhancement using the same standard that we apply to a conviction. (See *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

2. *Analysis*

a. *Count 1, exhibiting a firearm*

With respect to count 1, exhibiting a firearm in the presence of an officer in violation of section 417, subdivision (c), Markham contends that there was insufficient evidence that he "brandished" a weapon or that Officer Affrunti was acting in the lawful performance of his duties.

Section 417, subdivision (c) provides: "Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner . . . shall be punished" "The thrust of the offense[s] outlined in section 417] is to deter the public exhibition of weapons in a context of potentially volatile confrontations." (*People v. McKinzie* (1986) 179 Cal.App.3d 789, 794.)

According to Markham, "[t]he only support in the record for this charge is Officer Affrunti's testimony that, after [Affrunti] knocked [Markham] to the ground with a kick, [Markham] reached toward his rear pocket, gripped the handle of a gun, and moved it a couple of inches out of his pocket before Affrunti opened fire at him." This, Markham asserts, is not enough to be considered drawing or exhibiting a firearm in a rude, angry or threatening manner. According to Markham, case law "shows that the conduct targeted

under section 417 involves the act of wielding a firearm coupled with a specific threat to use it."

We conclude that Officer Affrunti's testimony as to what occurred does establish the elements of this offense. Affrunti testified that when he turned back toward Markham after having been distracted for a moment, Markham had shifted his position so that his back was no longer parallel to the ground. According to Affrunti, Markham was reaching with his right hand into his right pants pocket, and had pulled a gun out from his pocket a few inches. Markham contends that by "merely" pulling the handle of the gun out of his pocket while leaving the rest of it concealed, he did not " 'sha[k]e or wave' " the weapon, and maintains that this type of action is required under the dictionary definition of " [b]randish.' " Markham further asserts that because he did not say anything to Affrunti, he could not have acted in a " 'rude, angry or threatening manner.' "

There is no authority that would support Markham's contention that one must shake or wave a weapon in order to be guilty of the charged offense. The offense charges "exhibiting" a firearm, *not* "brandishing." Further, there is no requirement that the defendant have said anything to the victim in order to be found to have displayed the weapon in a rude, angry, or threatening manner. The situation in which Markham and Affrunti found themselves was clearly a volatile confrontation. The fact that Markham initially ran from the officers, that Affrunti repeatedly ordered Markham to show his hands and Markham refused to comply, and that Markham started to pull the firearm out from his back pocket, all support the jury's conclusion that Markham exhibited the firearm in a threatening manner.

Although Markham discusses other evidence that was contrary to Officer Affrunti's testimony, the jury was free to credit Affrunti's testimony and to discredit the other evidence. Affrunti's testimony is sufficient to establish the elements of the offense. (See Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) It is not our function to reweigh the evidence and substitute our determination of credibility for the jury's determination: "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg, supra*, 45 Cal.4th at p. 27.)

Markham also challenges the sufficiency of the evidence to support the jury's implicit determination that Officer Affrunti was acting in the lawful performance of his duties at the time Markham exhibited his gun. Markham's argument is essentially that this court should discount Affrunti's version of events because other witnesses' versions of what occurred differed from Affrunti's version. We decline to reweigh the evidence. The jury was given the opportunity to weigh the credibility of the various witnesses at trial, and clearly credited Affrunti's version of events, despite the contradictory testimony of the defense witnesses.⁸ Affrunti's version of events was that he issued multiple verbal

⁸ The jury was instructed regarding how to resolve a conflict in the evidence as follows:

"If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What

commands that Markham ignored. Markham was in a "football stance" and refused to show his hands to Affrunti or to get down on the ground. In order to effectuate an arrest, Affrunti had to use some level of force to get Markham to comply, since he was refusing to comply despite the fact that Affrunti had his firearm drawn and pointed toward Markham. In addition, the prosecution's law enforcement expert testified that Affrunti's actions were reasonable under the circumstances. There was clearly sufficient evidence to support the jury's determination that Affrunti was acting in the lawful performance of his duties at the time Markham began to draw his own weapon.

b. *Count 2, resisting arrest*

Markham also contends that there is insufficient evidence to support his conviction for resisting arrest.

Section 69 provides, in relevant part:

"Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine . . . or by imprisonment . . . or by both such fine and imprisonment."

"The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty.' [Citation.] The first form of a violation of

is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

section 69 'encompasses attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future.' [Citation.] The second form of violating section 69 'assumes that the officer is engaged in such duty when resistance is offered,' and 'the officer[] must have been acting lawfully when the defendant resisted arrest.' [Citation.]" (*People v. Nishi* (2012) 207 Cal.App.4th 954, 966.)

The parties in this case agree that the People proceeded on the second theory—i.e., that Markham resisted Officer Affrunti by force or violence while Affrunti was engaged in the performance of his duties. Markham contends on appeal that the evidence is insufficient to support his conviction under this theory because "[t]he only evidence in support of the notion that Affrunti acted reasonably was his own testimony, which was not only highly questionable because it was directly contradicted by a parade of witnesses but also because Affrunti had a powerful motive to stave off suspicion of wrongdoing." As we explained in the preceding subsection, it is not our role to reweigh the evidence or to make a credibility determination as to Affrunti's testimony. The jury made that determination, and it is clear that the jury believed Affrunti, despite the contradictory testimony and any possible motive that Affrunti may have had to avoid suspicion of wrongdoing on his part. We will not undermine the jury's determination by reassessing the credibility of Officer Affrunti's testimony in considering whether there is sufficient evidence to support Markham's conviction on this charge.

Markham also argues that even if Officer Affrunti's testimony is credited, his statement that Markham pulled his gun out only a couple of inches before Affrunti

opened fire "is simply not enough to support a finding of resistance by 'force or violence' within the meaning of section 69." Again, we disagree. Markham's exhibiting the firearm in these circumstances was clearly a threatening gesture, and, as such, was sufficient to constitute the use of force or violence against Affrunti. Although Markham cites to cases that involve the use of physical force against an officer (see *People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1415-1416 [defendant physically struggled against officers when being detained]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 986 [defendant was " 'yelling, kicking, [and] cussing' " and struggled against officers prior to being pepper sprayed]; *People v. Lacefield* (2007) 157 Cal.App.4th 249, 252-253 [involving physical altercation between defendant and officer]), there is nothing in these cases or others, nor is there anything in the statute, that *requires* that the force or violence used against an officer be in the nature of a physical assault and battery. We therefore reject Markham's position that because his conduct "involved no direct physical force" and "no statements, much less threats" it fell short of the conduct proscribed in section 69. Although Markham did not verbally threaten Affrunti, his refusal to comply with Affrunti's commands, followed by his pulling a firearm in the face of Affrunti's attempt to detain him, is sufficient to constitute the use of force or violence to prevent that detention.

c. *Gang enhancements*

Markham contends that there is insufficient evidence to support the jury's true findings on the gang enhancement allegations connected to counts 1 and 2.

Section 186.22, subdivision (b)(1) provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" The gang enhancement provision in subdivision (b)(1) has three elements (with exceptions not relevant for our purposes here): (1) conviction of a predicate felony; (2) that the underlying offense be committed for the benefit of, at the direction of, or in association with a criminal street gang; and (3) that the underlying offense be committed with the specific intent to promote, further or assist in any criminal conduct by criminal street gang members. (*Ibid.*)

Markham challenges the sufficiency of the evidence to establish that he committed the felony for the benefit of, at the direction of, or in association with The Projects street gang, and also challenges the sufficiency of the evidence to establish that he had the specific intent to promote, further or assist in any criminal conduct by members of The Projects. We conclude that while the evidence to support the gang enhancements attached to counts 1 and 2 may not be compelling, the evidence meets the minimum requirement necessary to withstand a sufficiency challenge.

With respect to the element that the felony be committed for the benefit of, at the direction of, or in association with a criminal street gang, there was sufficient evidence from which the jury could have inferred that Markham engaged in this conduct for the benefit of or in association with The Projects gang. Markham's tattoos indicated that he was a member of the gang. In addition, he had been contacted numerous times by police while in the company of members of The Projects gang in the gang's territory. Further,

there was evidence that Markham had committed crimes with other gang members. On the day of the incident, Markham was wearing clothing associated with the gang. Finally, Markham referred to himself by a gang moniker after the shooting when he said that he was " 'T-Dog from The Projects.' " Although a gang enhancement does not require that the defendant be a member of the gang, all of this evidence provides a context in which the jury could consider Markham's conduct with respect to Officer Affrunti, and from which the jury could reasonably infer that Markham engaged in the behavior at issue for the benefit of, or in association with, The Projects street gang. In addition, the gang expert testified as to how conduct such as Markham's could benefit the gang. The expert testified that a gang member's fleeing the police could benefit the gang by helping increase the notoriety of the gang. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*People v. Albillar* (2010) 51 Cal.4th 47, 63 (*Albillar*).) The jury could reasonably infer from all of the evidence that Markham fled from Officer Affrunti and pulled a gun on him in order to increase the gang's notoriety in its territory, thereby benefitting The Projects street gang.

With respect to the requirement that Markham have committed the felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members," the defendant need only have had the specific intent to promote, further, or assist in any criminal conduct by gang members, including the current offense, and not necessarily other criminal conduct by gang members. (See *Albillar, supra*, 51 Cal.4th at

pp. 64-65.) "[T]he scienter requirement in section 186.22(b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to any criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar, supra*, at p. 66.) Although Markham acted alone, there was sufficient evidence to demonstrate that he was a member of the gang, and that his conduct in resisting arrest and exhibiting a firearm was gang related conduct, as explained above. When the defendant is a gang participant, and, acting alone, commits a gang related felony, the defendant has promoted, furthered, or assisted in felonious conduct by a gang member—i.e., himself.⁹ There is clearly sufficient evidence to support the jury's implicit determination that Markham had the specific intent to promote or further his own gang related criminal conduct.

C. *The trial court applied the incorrect standard in considering Markham's motion for a new trial; remand for a new hearing is appropriate*

Markham contends that the trial court abused its discretion in denying his motion for a new trial because the court applied an incorrect standard of review in determining the motion. The People concede that the trial court articulated an incorrect standard in ruling on the motion, but assert that despite that fact, this court should nevertheless conclude that the trial court "properly considered the evidence and denied the new trial

⁹ The question whether a gang enhancement may be found true where a gang member acts alone in committing the underlying felony is currently under review by the Supreme Court. (See *People v. v. Gonzales* (2011) 199 Cal.App.4th 219, review granted Dec. 14, 2011, No. S197036.)

motion." In the alternative, the People assert that if we do not agree that the trial court properly considered the evidence, then remand is appropriate so that the trial court can consider the new trial motion again, applying the proper standard of review.

" 'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] ' "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." ' [Citations.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

After the jury rendered its verdicts, Markham moved for a new trial pursuant to section 1181 on the ground that the verdicts were contrary to the evidence. Section 1181 provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 6. When the verdict or finding is contrary to law or evidence"

In denying the motion, the trial court stated:

"Well, in looking at the sufficiency of the evidence, of course, the standard is not necessarily what the court would decide based upon the facts presented, but whether or not the evidence presented was sufficient to support the jury's finding, even if someone else might come to a different conclusion based on that evidence.

"With regard to the charge of resisting an executive officer by force, and with regard to the charge of brandishing, we, of course, had extensive discussions about that with regard to the [section] 1118.1 motion to dismiss, and the cases that define those crimes make it clear that far less is required than what would be the normal lay person's initial impression of what constitutes those crimes.

"And we had a discussion about the specific cases and the specific showings that were necessary.

"I'm satisfied that the evidence here was sufficient to support the jury's finding of guilt as to both the [Penal Code section] 69 charge and the brandishing charge.

"The enhancement, or use of a firearm, again if we were to utilize a lay person's view of that, whether a person reaching or attempting to pull a gun from their pocket is sufficient for use of a firearm, it might be a close issue.

"However, in looking at the legal requirements, the case of People v. Dominguez, D-o-m-i-n-g-u-e-z, at 38 Cal.App.4th 410, set forth the . . . minimum elements for use of a firearm. That there must be some type of display of the weapon, coupled with a threat to use it, that produces fear of harm in the victim.

"And, with regard to the issue of display of a weapon, that brings us back to the elements of exhibiting a firearm, and the fact that the firearm was visible and there was an attempt to draw the weapon, that constitutes a sufficient display and threat to use the weapon.

"And, clearly, Officer Affrunti indicated that the totality of those actions caused fear in him.

"Again, the facts are such that the jury could find either way, but then I think the evidence is sufficient to support the jury's finding that enhancement to be true.

"Likewise, with regard to the gang enhancement, there was ample evidence to indicate that the defendant was either a member or an associate of the gang, that he hung out with members of the gang, and what the gang's activities were. Certainly, an argument could be made, and was made, that the defendant's only intent throughout the entire sequence of these events was to escape Officer Affrunti, because he was on probation, because he had a gun, because he was in the gang area. His only intent was to escape, and he wasn't thinking about, you know, 'This is going to enhance me in the gang. This is going to be good for the gang. This is what the gang does.'

"On the other hand, as pointed out by Mr. Webster, there was evidence from which a jury could find that the particular gang that the defendant was a member or associate of, the particular gang members that the defendant hung out with, did indeed have a

propensity or purpose to assault police officers, and this was at least part of the defendant's intent and motivation at the time.

"So, again, there's evidence from which a jury could find either way. But I think there's sufficient evidence to support the jury's finding of that enhancement."

On a motion for a new trial, a trial court "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt to the judge, who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to [the] . . . evidence.' [Citations.] In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133-134, italics omitted (*Porter*).) It is thus clear that trial courts do not employ the same standard on a section 1181 motion for a new trial as a reviewing court applies in weighing the sufficiency of the evidence. (*People v. Serrato* (1973) 9 Cal.3d 753, 761, disapproved of on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) However, in articulating the standard that it was applying to Markham's motion for a new trial, the trial court stated the standard that a reviewing court applies in weighing the sufficiency of the evidence. Specifically, the court stated, "Well, in looking at the sufficiency of the evidence, of course, the standard is not necessarily what the court would decide based upon the facts presented, *but whether or not the evidence presented was sufficient to support the jury's finding*, even if someone else might come to a different conclusion based on that evidence." (Italics added.) In fact, the proper standard *is* what the court would decide based upon the facts presented.

The People concede that the standard that the trial court articulated is not the proper standard to apply to a motion for a new trial under section 1181. According to the People, however, "when viewed as a whole, the trial court's comments demonstrate it conducted the appropriate review of the record." In support of this contention, the People cite to *People v. Price* (1992) 4 Cal.App.4th 1272 (*Price*), and *Davis, supra*, 10 Cal.4th at page 523. In *Price*, the trial court denied a motion for new trial, commenting, "I think the evidence was sufficient, and *I think that the jury—there was enough evidence there for the jury to do what the jury did . . .*" (*Price, supra*, at p. 1275.) On appeal, the *Price* court rejected the defendant's contention that the trial court had applied the incorrect legal standard in assessing his motion for a new trial, reasoning:

"The court first denied the request for new trial, and then said, 'I think the evidence was sufficient.' Only after making this statement did the court say 'there is enough evidence there for the jury to do what the jury did' In other words the court's exercise of its independent judgment is reflected in its statement that the evidence was sufficient. The court's further comment there was substantial evidence to support the jury's determination is surplusage." (*Ibid.*)

According to the People, the trial court in this case did the same thing as the trial court in *Price*, in that the court "indicated [that] it believed the evidence was sufficient." However, each time the trial court "indicated [that] it believed the evidence was sufficient" according to the People, the trial court did not, in fact, indicate that *the court* believed that the evidence was sufficient to prove the charges beyond a reasonable doubt. Rather, the court stated that the evidence was sufficient *to support the jury's findings* (i.e., "I'm satisfied that the evidence here was sufficient to support the jury's finding of guilt . . . "; "I think the evidence is sufficient to support the jury's finding that the

enhancement [was] true"; and "I think there's sufficient evidence to support the jury's finding of that enhancement"). These statements are not similar to the trial court's statement in *Price*, on which the appellate court in that case relied. The trial court here never indicated, in any fashion, that it had independently reviewed the evidence as the so-called 13th juror. Rather, the entirety of the court's comments suggest the opposite—i.e., that the court reviewed the evidence not as the 13th juror, but as a reviewing court would examine the evidence to determine if it is sufficient to support the jury's findings.

For this reason, we also reject the People's attempt to portray what occurred here as being similar to what occurred in *Davis, supra*, 10 Cal.4th at page 523. In *Davis*, the defendant asserted on appeal that certain statements that the trial court had made in denying his motion for a new trial indicated that the trial court had applied an improper standard of review in assessing the motion. The Supreme Court explained:

"Defendant claims error, pointing to certain statements by the court that he argues indicate use of an improper standard of review. Thus, on the issue of premeditation and deliberation, defendant quotes the trial court as stating: 'The Jury did reach a result and the question is: Is the result that they reached supported by the circumstantial evidence and inferences that could be made or are those inferences also really not inferences and the Jury just speculated because they thought they didn't like the defendant, they thought it was a horrendous crime.' On the kidnapping and sodomy charges, defendant quotes the trial court as stating: 'the court feels there was sufficient evidence to support the verdicts on those counts.' It also stated, in reference to the kidnapping charge: 'And I think the evidence supports that, and I think the jury finding of that supported by the evidence, and some, of course, leaving premeditation and deliberation aside, I think that the Court or jury was adequately instructed as to all of the law that applied to the case. [¶] I think that the jury applied the law to the facts and I am not at this time prepared to set aside any of the conclusions that they made as to counts 3—strike that counts 2 and 3.' " (*Ibid.*)

In rejecting the defendant's position, the *Davis* court concluded that the record established that the trial court "expressly articulated the correct standard of review," and then "independently determined the credibility of the witnesses and the probative value of the evidence." (*Davis, supra*, 10 Cal.4th at p. 524.) Thus, "[a]lthough defendant isolate[d] statements in which the trial court refers to the jury's verdicts, *it is clear from the record as a whole that it did not regard itself as bound by any of the jury's findings.*" (*Ibid.*, italics added.) The record in this case reveals the contrary. The trial court expressly articulated an incorrect standard of review, and repeatedly expressed its evidentiary review in terms of whether the evidence supported the jury's finding, indicating that the trial court did regard itself as bound by the jury's findings. We conclude that the trial court failed to conduct an independent assessment of the evidence that convinced the court that the evidence was sufficient to prove each required element beyond a reasonable doubt.

The People concede that if this court concludes that the trial court abused its discretion in not independently assessing the evidence as required under *Porter, supra*, 47 Cal.4th at pages 133-134, the appropriate remedy is a limited remand to allow the trial court the opportunity to rehear the motion for a new trial. (See *People v. Robarge* (1953) 41 Cal.2d 628, 635.)

The trial court's comments, made at the sentencing hearing at which the trial court struck the penalty on the gang enhancement allegations, indicate that the trial court may have had a different view of the evidence than the jury. For example, the court stated,

"[T]he defendant was not wearing specifically identifiable gang clothes. He didn't flash any gang signs at the time. He didn't state anything about the gang at the time. And, as indicated, probably the primary motivation of the defendant was simply to escape Officer Affrunti. [¶] Now, certainly, as has been indicated, and as the court indicated, there was additional evidence that indicated because of his association with the gang he might more readily resort to assaulting a peace officer with a firearm, and he might be motivated by that. [¶] But the court finds that was not the primary motivation and intent of the defendant." It is clear that there was at least a question in the court's view as to the strength of the evidence supporting the jury's findings, particularly with respect to the gang enhancements. We therefore remand the matter for the trial court to reconsider Markham's motion for a new trial under section 1181.¹⁰

¹⁰ Our analysis of Markham's challenge to the sufficiency of the evidence to support his convictions on counts 1 and 2 and the gang enhancements in part III.B., *ante*, should not be considered to be suggesting that the trial court should reach any particular result when it reconsiders Markham's motion for new trial. As noted above, our review of the evidence on appeal is limited to the question of whether there is sufficient evidence to support the jury's findings, whereas the trial court's role on a motion for new trial is to determine, independently, whether the evidence is sufficient to prove each required element beyond a reasonable doubt.

IV.

DISPOSITION

The judgment and order denying Markham's motion for a new trial is vacated.

The trial court is to rehear and redetermine appellant's motion for a new trial applying the appropriate standard. If the court grants appellant's motion for a new trial, it shall order a new trial. If the court denies the motion for a new trial, it shall reinstate its order denying the new trial motion and shall reinstate the judgment. In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.